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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re DESTINY M. et al., Persons Coming
Under the Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

ELIZABETH C.,

Defendant and Appellant.

G042149

(Super. Ct. Nos. DP015255
& DP015256)

O P I N I O N

Appeal from orders of the Superior Court of Orange County, Salvador Sarmiento, Judge. Affirmed.

Maryann M. Milcetic, under appointment by the Court of Appeal, for Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Debbie Torrez, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minors.

Elizabeth C. appeals from an order denying a changed circumstances petition that requested further reunification services and custody of her two children, Destiny M. and Margarita M. She also appeals from a subsequent order that terminated parental rights. Elizabeth argues it was an abuse of discretion to deny the petition without an evidentiary hearing, and parental rights should not have been terminated because the benefit exception applies. We disagree and affirm.

FACTS

In May 2007, Elizabeth tested positive for methamphetamine while giving birth to a third child. A hospital hold was placed on the baby (Mario, who later reunified with his father and is not involved in this appeal). Destiny (then 3 1/2 years old) and Margarita (then 2 years old) were detained.

The Orange County Social Services Agency (SSA) filed a dependency petition that alleged Elizabeth was unable to care for the children due to unresolved substance abuse. (Welf. & Inst. Code, § 300, subd. (b).)¹ Elizabeth did not appear for the jurisdiction/disposition hearing. SSA reported she had tested positive for methamphetamine four times while pregnant and was on probation after serving a burglary sentence in a juvenile detention facility. The petition was sustained, the children were placed with A.A., the maternal grandmother, and reunification services were ordered.

It turned out Elizabeth was incarcerated in a juvenile facility, serving a 310-day sentence. While incarcerated, she visited with the children and spoke to them over the telephone weekly. The visitation monitors reported the visits went well. Elizabeth also completed a parenting course, drug counseling and treatment, and attended 12-step meetings.

¹

All subsequent statutory references are to the Welfare and Institutions Code.

Elizabeth was released from custody in June 2008. She had some problems at first, leaving a sober living home after one day to move in with her father, missing three drug tests, and foregoing visitation through late July. After that, things smoothed out, with clean drug tests, regular attendance at 12-step meetings, and participation in a parenting program.

In September 2008, the assigned social worker increased visitation at A.A.'s home. A monitor reported Elizabeth acted appropriately, the children were happy to see her, and they would hug and kiss her when she left. A.A. agreed Elizabeth acted properly. But, she said, Elizabeth "acts as a visitor [because] they play during the visits" and "does not take initiative [in] bathing the girls . . . cooking, or washing." Visitation was increased and went well, though A.A. told the assigned social worker "she does not trust [Elizabeth] [and] is afraid [Elizabeth] will leave the children with just anyone."

Visitation was increased the next month to add overnight visits with Elizabeth at her residence in the father's home. There were some problems. The children did not want to go. There were reports Elizabeth did not supervise the girls appropriately and that an unidentified male was driving them around. Sometimes, the children returned to A.A.'s dirty, wearing the same clothing they had on when they left. A.A. told a social worker Elizabeth would spend part of the time during visits talking on the telephone or putting on makeup instead of spending the time with the girls. She still believed Elizabeth was "not responsible enough to take care of the girls." The grandfather (C.) and his wife also felt Elizabeth was not responsible, saying she did not supervise the girls properly, she had a male friend in the neighborhood, and she would stay out late or not come home at all some nights, and she lied a lot.

In late November 2008, Elizabeth decided not to reunify with the children. She told the social worker it would be best for them to remain with A.A. where they had always lived, since she could not support them. The support explanation seemed odd to

the social worker, because C. and his wife had promised to support Elizabeth and the children if she regained custody.

At the 18-month review on December 1, 2008, SSA reported the matters set out above. The court terminated reunification services and set the matter for a permanency planning hearing. Later that month, SSA removed the children from A.A.'s home. It turned out A.A. allowed two sons with criminal records to reside in her home, even after she had been warned that was impermissible if she wanted to care for the children. The children were placed with C. and his wife, and Elizabeth was given visitation to be monitored by C.

Elizabeth filed the changed circumstances petition in May 2009. As an alternative to further services and custody, she requested visitation outside C.'s home with an independent monitor. To show changed circumstances, Elizabeth declared she had been off drugs since August 2007 and completed the requirements of her service plan. She said she was renting a room in Costa Mesa with space for three beds to accommodate herself and the girls, she worked 35 hours a week as a cashier, and was applying for a job as a medical assistant. She claimed to be "stable, rehabilitated, ready, and able to care for her girls." To show the change would benefit the children, Elizabeth said the following: "Mother has grown up, learned the error of her ways, and is now in a rehabilitated and responsible position to be a stable and loving mother to her children. No one loves these children more than their mother and having the love, support, and care of their mother is definitely in the children's best interests. The children love their mother and need her."

In response, the assigned social worker reported that since November 2008, "mother has not drug tested as she decided not to reunify with her children." The social worker did not know if Elizabeth remained sober, received no verification she continued to attend 12-step meetings, and could not confirm Elizabeth was working. Elizabeth told the social worker she had left C.'s home to live with a boyfriend in Costa Mesa, but she

would not reveal the address or the boyfriend's name. C. told the social worker the boyfriend had a criminal record and was on probation.

At a hearing on the motion, Elizabeth argued an evidentiary hearing was required because events had not unfolded as she had expected when she decided not to reunify. Elizabeth had believed the children would be placed with A.A. and she would enjoy visitation. The juvenile court declined to take evidence and denied the motion. It said "based on the documents that were filed . . . the court fail[s] to see any . . . facts . . . why it [would] be in the children's best interest . . . to change the order."

The permanency planning hearing followed in late May 2009. SSA reported visits from fall 2007 to spring 2008 went well. The girls were excited and happy to see Elizabeth, giving her hugs and kisses. Sometimes, Margarita ran to Elizabeth to give her a hug and kiss. Elizabeth fed the girls, played with them, was attentive to their needs, and was able to set boundaries and discipline them appropriately. When the time came to end the visits, she hugged and kissed the girls. One of the monitors said visits were good and Elizabeth was a "pretty good" mother.

The assigned social worker testified Elizabeth missed about half her visits after December 2008, and she had not visited at all since the beginning of April 2009. The social worker said the visits had been appropriate, although she was concerned about Elizabeth's ability to care for the children. She said Elizabeth had never taken care of the children on her own, since she had always lived with A.A. who was the primary caregiver.

Elizabeth testified she had raised both girls when she was living with A.A. prior to detention. She fed, bathed, and changed the children, taught them manners, numbers and colors in English and Spanish, supervised play outdoors, and took them to doctor's appointments. The girls always called her "Mommy." After detention, Elizabeth said she always acted as a parent when she visited. She brought flash cards to teach the girls their colors, and little lined books to help them write their names. She

would read to them, talk about how they were doing at school, help with homework, feed them, fix their hair, and take the children to the bathroom.

The juvenile court found the benefit exception did not apply. It said “though [Elizabeth] was given huge opportunities . . . she failed to exercise visits that would have be[ne]fitted the minors in developing a relationship with her [¶] . . . [¶] Other people have been nurturing and providing all of the children’s needs: feeding, clothing, housing, guidance and discipline; [Elizabeth] has done none of these. . . . [¶] The court did not receive any evidence . . . the . . . children . . . have developed a significant positive emotional relationship with [Elizabeth]. . . . [¶] The relationship between [Elizabeth] and the two [children] is more of a visiting relative than that of a parent. [¶] . . . [¶] The exception does not permit a parent, who has failed to reunify . . . to derail an adoption merely by showing the child will derive some benefit from the continuing relationship” The court found the children were likely to be adopted and terminated parental rights.

I

Elizabeth argues she was entitled to an evidentiary hearing on the changed circumstances petition because it set out a prima facie case of changed circumstances and benefit to the children. She is mistaken on the benefit point, and that is determinative.

A prior order may be modified or set aside only where a parent establishes changed circumstances and the modification would be in the best interests of the child. (§ 388; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) A prima facie showing that would support granting the petition is required to trigger an evidentiary hearing. (*In re Zachary G., supra*, 77 Cal.App.4th at p. 806.) To determine whether a proposed change would be in the child’s best interests, the court considers: “(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of the problem; (2) the strength of the relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or

ameliorated, and the degree to which it actually has been.” (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532.)

The juvenile court made the only possible call when it denied the petition without an evidentiary hearing. Elizabeth’s supporting declaration offered platitudes and conclusions but no evidence. It claimed granting her custody was in the best interests of the children because “[m]other has grown up, learned the error of her ways, and is now in a rehabilitated and responsible position to be a stable and loving mother to her children. No one loves these children more than their mother and having the love, support, and care of their mother is definitely in the children’s best interests. The children love their mother and need her.” But this is not *evidence* of facts Elizabeth was drug free and would remain so. Nor is it evidence of a lasting bond with the children that outweighed any bond with the caretakers (C. and his wife, who wanted to adopt the children) to the degree the children would be better off if Elizabeth regained custody. Since the petition failed to make out a *prima facie* showing the change sought would be in the best interests of the children, it was properly denied without taking evidence.

Elizabeth argues the “the face of the petition itself” demonstrated a hearing was in the children’s best interests. We cannot agree. Elizabeth’s best interests claims were conclusory statements she was rehabilitated and responsible, devoid of facts that might support her position. There was no abuse of discretion in denying the changed circumstances petition.

II

Elizabeth also contends the evidence does not support the court’s finding the benefit exception was not proven at the time it terminated her parental rights. She claims it shows she regularly visited the children and established a “positive, beneficial” relationship with them. Even assuming regular visitation (which seems contradicted by the testimony of the social worker that visitation dropped *by half* in December 2008 and

stopped entirely in April), there was no showing the children would benefit from continuing the parental relationship.

The benefit exception is one of several that permit the juvenile court to not terminate parental rights as otherwise mandated by statute. It applies if the court finds “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) To decide the benefit issue, “the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a *substantial, positive emotional attachment such that the child would be greatly harmed*, the preference for adoption is overcome and the natural parent’s rights are not terminated.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575, italics added.) The burden of proof is on the parent. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.)

There is no question the benefit exception was not met. Even assuming Elizabeth enjoyed a positive and beneficial relationship with the children, that is not sufficient. What must be shown is a *substantial* and positive emotional attachment, such that the child would be *greatly harmed* by severing the parent-child relationship. This showing was not suggested.

The juvenile court found no evidence Elizabeth had a “significant positive emotional relationship” with the children, and no such evidence has been pointed out to us. Nor was there any evidence of great harm from severing the parental relationship – no psychological study or expert testimony, nor statements from the caretakers, monitors, or the children bearing on the impact of terminating parental rights on the children – not even an offer of proof of any such thing. The inescapable conclusion is that Elizabeth failed to meet her burden of proving the benefit exception.

Elizabeth argues she met the benefit exception based on the various favorable comments from social workers and monitors concerning her visits through the fall 2008. But that misses the point. At most, the evidence was the children enjoyed seeing Elizabeth and she acted appropriately during visits, which falls far short of what is required to invoke the exception.

Since the juvenile court acted within its discretion in denying the changed circumstances petition, and the evidence supports the finding the benefit exception was not proven, the orders appealed from must be affirmed.

BEDSWORTH, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.